151 U.S. 366

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 886.

THE UNITED STATES, APPELLANT,

v.

ALBERT W. STAHL.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 8, 1893.

15256.

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11031

1 IN THE COURT OF CLAIMS.

ALBERT W. STAHL
vs.
THE UNITED STATES. } 16471.

I.—*Petition filed March* 2, 1889.

To the honorable, the judges of the Court of Claims:

The petition of Albert W. Stahl respectfully shows to your honors:

That he is a citizen of the United States, and entered the Naval Academy as a cadet engineer, September 14th, 1876, and graduated June 10th, 1880. He was commissioned an assistant engineer June 10th, 1882, and resigned from the naval service August 10th, 1887.

That your petitioner received no credit as assistant engineer for the time of his prior service under the act of March 3d, 1883. (22 Stats., 473).

Wherefore your petitioner prays judgment against the United States in the sum of $1,000.

Your petitioner says that he is the sole owner of this claim, and has never assigned the same or any part thereof to any person; that he is justly entitled to the amount herein claimed, after deducting all just credits and offsets, and that he has appointed John Paul Jones, of Washington, D. C., his attorney, for the prosecution of this claim.

ALBERT W. STAHL,
By JOHN PAUL JONES.

John Paul Jones, being first duly sworn, according to law, says that he is the attorney of the petitioner named in the foregoing petition, and signed the same as such, and that the contents thereof are true to the best of his knowledge and belief.

JOSEPH W. AMAN,
Commissioner Court of Claims.

MARCH 1, 1889.

2 II.—*Traverse filed February* 3, 1890.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

JOHN B. COTTON,
Assistant Attorney-General.

3 III.—*Findings of fact and conclusion of law. Filed January 26, 1893.*

This case having been heard by the Court of Claims, the court finds the facts as follows:

I. Claimant entered the Naval Academy September 14th, 1876; graduated June 10th, 1880, and was commissioned assistant engineer June 10th, 1882.

II. On August 10th, 1887, he resigned his commission as assistant engineer.

III.—On August 11th, 1887, he was duly appointed and commissioned an assistant naval constructor.

IV.—Claimant has never received any credit upon his commission as assistant engineer for his service in the Navy from his entry into the Naval Academy, to wit, September 14th, 1876, till the date of his said commission, to wit, June 10th, 1882.

V.—On December 30th, 1888, claimant was given credit for his prior service at the Naval Academy and as assistant engineer upon the commission then held by him, viz, that of assistant naval constructor. The amount due claimant is $1,000, as unpaid longevity pay.

CONCLUSION OF LAW.

Upon the foregoing facts the court determines as a conclusion of law that the claimant is entitled to recover the sum of one thousand dollars.

(The court filed no opinion in this case.)

4 IV.—*Judgment by the court.*

ALBERT W. STAHL
v. } 16471.
UNITED STATES.

At a Court of Claims held in the city of Washington on the 26th day of January, 1893, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge, and decree that the claimant, Albert W. Stahl, do have and recover of and from the United States the sum of one thousand dollars.

BY THE COURT.

5 V.—*Application of defendants for and allowance of appeal.*

ALBERT W. STAHL
vs. } No. 16471.
THE UNITED STATES.

From the judgment rendered in the above-entitled cause on the 26th day of January, 1893, in favor of claimant, the defendants, by their Attorney-General, on the 31st day of January, 1893, make application for and give notice of an appeal to the Supreme Court of the United States.

JOHN B. COTTON,
Assistant Attorney-General.

Filed and allowed in open court, January 31, 1893.

WILLIAM A. RICHARDSON,
Chief Justice.

6 IN THE COURT OF CLAIMS.

ALBERT W. STAHL
vs.
THE UNITED STATES. } No. 16471.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the judgment of the court, of the application of defendants for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 6th day of February, A. D. 1893.

[SEAL.] JOHN RANDOLPH,
Assistant Clerk, Court of Claims.

(Indorsement on cover:) Case No. 15256. Term No. 886. The United States, appellant, vs. Albert W. Stahl. Court of Claims. Filed February 8th, 1893.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, APPELLANT,
v.
ALBERT W. STAHL. } No. 886.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, APPELLANT,
v.
ALBERT W. STAHL. } No. 886.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

STATEMENT.

This case and that of the *United States* v. *Philip R. Alger*, No. 885, will be submitted at the present term of the court under Rule XX.

The findings of fact set forth in the record (page 2) present in most respects a statement of the case. They do not show whether claimant was or was not in the Navy between June 10, 1880, and June 10, 1882. But by reference to the Register of the Navy, for 1892, page 62, the court will see that claimant is reported to have been in the Navy on January 1, 1892, a period of fifteen

years and four months; that is to say, he was continuously in the Navy since he entered the Naval Academy in September, 1876.

The claim is for longevity pay of assistant engineer at the rate prescribed for officers of that grade after the first five years from date of their appointment. Claimant was paid as assistant engineer the rate provided for the first five years after date of appointment in that grade. The difference is $200 a year, and judgment had been entered for claimant for that difference for five years, to wit, $1,000.

On August 11, 1887, during the recess of the Senate, claimant was duly appointed and commissioned as assistant naval constructor. On December 30, 1888, he was credited in that grade with all the time he was in the Navy prior to August 11, 1887, nearly eleven years, and he has been paid the rate prescribed by the statute for assistant naval constructors after eight years from date of appointment, instead of the rate prescribed for the first four years in that grade. The difference in pay between these rates is as follows:

Pay of assistant naval constructor.

	When on duty.	On leave, etc.
First five years after date of appointment	$2,000	$1,500
After eight years from date of appointment	2,600	1,900
Difference	600	400

The findings do not show whether the payments made to claimant in this grade were those prescribed for "duty" or for "leave;" nor do they show any nomination and

appointment of the claimant as assistant naval constructor after said recess appointment, but as the Register of the Navy shows that he was continuously in the Navy since he entered the Academy, it may be assumed that he was appointed by and with the advice and consent of the Senate, and that there has been no break in his service in the Navy.

ASSIGNMENT OF ERRORS.

(1) The court below erred in its conclusion of law on the facts found, that there is due from the defendant to the claimant $1,000 as longevity pay.

(2) The court below erred in its conclusion of law on the facts found, that the defendant is indebted to the claimant in any sum of money.

(3) The court below erred in its conclusion of law on the facts found, that claimant is entitled to recover the sum of $1,000 from the defendant.

(4) The court below erred in ordering, adjudging, and decreeing that the claimant, Albert W. Stahl, do have and recover of and from the United States the sum of $1,000.

ARGUMENT.

I.

In support of the errors assigned we rely on the argument in appellant's brief in the Alger Case, submitted with this case.

We deny that defendant was or is entitled to any longevity pay in the grade of assistant engineer prior to June

10, 1887. After this date, and up to and including August 10, 1887, the statute allowed him the longevity pay prescribed for the grade during the second five years after date of appointment. We assume he has been paid that longevity pay, as he has not claimed it in this suit.

The cases now submitted are not within the reason of the act of 1883. The origin and purpose of longevity pay are clearly stated by Drake, C. J., delivering the opinion of the Court of Claims in *Thornley* v. *United States* (18 C. Cls. R., 111–113 U. S., 310). It is there said:

> Men grew old as lieutenants, with no increase of pay from the day they became such till they reached the period of promotion to a higher grade. * * * This was no doubt the underlying principle and purpose in the introduction of longevity pay in the Navy. We think it was intended, *first*, to induce men to enter the Navy and remain in it for life; *second*, to remove the depressing influence of long periods of service in one grade without an increase of pay; *third*, to compensate for increased professional knowledge and efficiency in officers, by increasing their pay in advance of promotion.

If remaining a long period in one grade is the underlying principle and purpose of longevity pay, certainly the claimant's case is not within that principle, because on graduating from the Naval Academy he was *at once* advanced to the grade of assistant engineer. Only two months after his first five years in that grade he was advanced to the office or grade of assistant naval constructor, and for these two months he received longevity pay. He was only two

months within this principle of longevity pay, and for that time he got its benefit. Certainly it was not for such cases that Congress passed the act of 1883.

II.

If, however, it were conceded that the continuous service of the claimant from the time of his entry into the naval school on September 14, 1876, was to be credited him under the provisions of the act of 1883, as service in the lowest grade held by him since last entering the Navy, our contention is—as in the Alger case submitted herewith—that such credit should be given only in the position of assistant engineer. This would entitle him to substantially the amount claimed in the petition, but for the fact that it appears by the fifth finding, that he has already been paid a considerable sum as longevity pay in his later grade of assistant naval constructor. The amount of such overpayment is not declared by the findings, but whatever the amount, it is apparent that no deduction was made by reason thereof, but that the court held in this case, as well as in the Alger case, that they were entitled to credit for this prior service in both of these respective grades.

Upon the argument in the Alger case we therefore contend in this case, that the payments of longevity pay in the higher grade were improperly allowed by the accounting officer; and that if the court should consider claimant to be entitled to credit for prior time in the grade of assistant engineer, the judgment must be reversed in order to enable the Court of Claims to find the amount of such overpay-

ment and deduct the same from the amounts earned in the grade of assistant engineer, unless the accounting officers have the power to make the proper deduction as suggested in *United States v. Harmon* (147 U. S., 268).

J. E. DODGE,
Assistant Attorney-General.
FELIX BRANNIGAN,
Assistant Attorney.

Office Supreme Court U. S.
FILED.
DEC 1 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, Appellant,
vs.
ALBERT W. STAHL, Appellee. } No. 886.

BRIEF FOR APPELLEE.

This case is the converse of United States *vs.* Alger, No. 885. The appellee in this case had resigned from the grade of assistant engineer in the Navy August 10, 1887, and was appointed assistant naval constructor August 11, 1887. At this time the longevity pay clause of the act of March 3, 1883, was still under discussion in the courts. Its construction was not settled until November, 1888, when this court decided the case of The United States *vs.* Cook (128 U. S., 254). After that decision the accounting officers of the Treasury allowed appellee credit in his grade of assistant naval constructor for all of his prior service, but declined to allow him credit in his grade of assistant engineer for his service prior to entering said last-named grade.

It is submitted that under the decision in Cook's case appellee was entitled, from the date of the passage of the act of March 3, 1883, to credit for his service prior to entering upon the grade of assistant engineer. No subse-

quent legislation denied him this credit. It was in the nature of earned compensation which even Congress could not have taken away. Whether the allowance of credit in the grade of assistant naval constructor was or was not proper (and we insist that it was upon the grounds set forth in the brief in United States *vs.* Alger) there can be no question as to the right of appellee to credit in his grade of assistant engineer.

We respectfully submit the case, asking that the brief in United States *vs.* Alger may be considered by the court in connection with this case.

JOHN PAUL JONES,
Attorney for Appellee.

151 U S 366

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 886.

THE UNITED STATES, APPELLANT,

vs.

ALBERT W. STAHL.

APPEAL FROM THE COURT OF CLAIMS.

Application for a Rehearing by William A. Maury for Appellee and Others in Like Situation.

WILLIAM A. MAURY,
Of Counsel, &c.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 886.

THE UNITED STATES, APPELLANT,

vs.

ALBERT W. STAHL.

APPEAL FROM THE COURT OF CLAIMS.

Application for a Rehearing by William A. Maury for Appellee and Others in Like Situation.

The undersigned, by permission of the appellee, Albert W. Stahl, and his counsel, respectfully requests, in behalf of the appellee and the other officers of the navy who are affected by the recent decision of the Court in the above-entitled case, that the said case may be restored to the docket for oral argument and reconsideration upon the following grounds:

It will be remembered that the appellee, after entering the Naval Academy on September 14, 1876, and reaching the grade of an assistant engineer, resigned his commission

on August 10, 1887, and on August 11, 1887, was appointed and commissioned an assistant naval constructor, and that, as such, he has been credited with the whole period of his service in the navy and has received longevity pay upon the theory that the grade of assistant naval constructor was the lowest grade having graduated pay held by him "since last entering the service," within the meaning of the act of March 3, 1883, c. 97 (22 Stat., 473), which provides that "all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy or both and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular navy in the lowest grade having graduated pay held by such officer *since last entering the service*."

But, through some inadvertence, no doubt, the appellee has received no time credit as assistant engineer nor the additional pay resulting therefrom under the act, and this suit was brought to recover the amount necessary to make up to the appellee what he claims to be due him on the score of longevity pay during the life of his commission as assistant engineer.

The Court of Claims gave judgment for the amount sued for, which this Court holds was error, not, however, because the appellee was not entitled under the act of 1883 to the time credit and the longevity pay resulting therefrom while an assistant engineer, as claimed by him, but because the Government, as alleged, had become entitled to deduct from the amount thus due the supposed excess of pay the appellee had been improperly drawing as assistant naval constructor on the theory that he was entitled to receive longevity pay as such, whereas this Court holds that he was not so entitled, because his appointment as assistant naval constructor did not constitute a re-entry into the navy, but was only a continuation of his former service, and, accordingly, the judg-

ment was reversed and the case sent back for further proceedings in accordance with the Court's opinion.

If the case had been orally argued it is more than probable that the attention of the Court would have been called to some important considerations of a public and general character which do not seem to have been mentioned or weighed.

In the first place, the act of the appellee in resigning his commission as assistant engineer preparatory to his appointment as an assistant naval constructor was in obedience to a *requirement* of the Navy Department *as a necessary step in an officer's transfer from one branch of the service to another*, and if the appellee had not been mindful of this practice by sending in his resignation it would have been required by the department before issuing his commission as an assistant naval constructor. This is conclusively established by the letter of the Secretary of the Navy of February 28, 1894, which, together with the letters that called it forth, is printed at the end of this brief, and in which the Secretary states that "*it has been the invariable practice of the Navy Department to require officers serving in one branch of the naval service to resign from the navy before accepting appointment to any other branch of the service.*" * * *

In view, then, of this well-established practice, of which it is conceived this Court will take notice, the intimation, if not direct imputation, in the Government's brief that the appellee's act in resigning was a mere subterfuge for a sordid purpose was an unjust and unwarrantable reflection upon the appellee and the other honorable gentlemen of the navy who are in his situation, as well as disrespectful to a great department of the Government, and, no doubt, misled the Court into some suspicion of improper conduct on the part of the appellee.

It is an equally well-known fact that in the Navy Department and in the navy generally it has been understood from the passage of the act of 1883 down that a transfer from one

branch of the service to another entitled the officer transferred to longevity pay under the act, whether such officer had already had the benefit of the act or not before his transfer.

In other words, the Secretary of the Navy, in the performance of his duty of interpreting and applying the laws appertaining to that arm of the service, has always held that the proceeding of transferring an officer from one branch of the service to another *involved, first, a severance of all connection with the service and then a re-entry into it.* And hence when the appellee was transferred to the construction corps his name was placed *at the foot of the list of assistant naval constructors* in obedience to section 1485, Revised Statutes, which provides that "The officers of the staff corps of the navy shall take precedence in their several corps and in their several grades, and with officers of the line with whom they hold relative rank, *according to length of service in the navy.*"

In short, the appellee, so far as his rank or precedence in the construction corps is concerned, was treated *precisely as though his transfer had been his first entry into the navy.*

This is also established incontrovertibly by the letter of the Secretary of the Navy of February 28, 1894, and the other letters already referred to and hereto annexed. In his letter the Secretary says that "*it has further been the uniform practice to place the names of such officers* [transferred to one corps from another] *without regard to their previous rank, at the foot of the list of officers* in the new corps. *In such cases it has been the practice to require a new oath of office to be taken, which is not required in case of an ordinary promotion. It appears from the above statement that the department has always held that such transfer constitutes a re-entry into the navy, and accordingly officers so transferred have been placed at the foot of the list of the corps which they enter.*"

Now, this practice of the department, of which the Court will take notice, seems wholly at war with the idea advanced

in the Government's brief that the appellee's service in the engineer and construction corps is one continuous service; for upon that theory we should expect to find the appellee transferred to an equivalent rank in the construction corps to what he had held in the engineer corps, instead of being sent to the foot of the list, as he undoubtedly was.

In view, then, of this rooted and well-known practice of the Navy Department, it is somewhat surprising that the counsel for the Government should have argued, with apparent confidence, that the continuity of the appellee's service in the navy was not interrupted by his transfer from the engineer to the construction corps *any more than if he had been promoted to another grade in the engineer service.* This line of argument can only be accounted for as being the result of an apparent failure of counsel to recognize the distinction between *transfer* and *promotion,* which they seem to treat as interchangeable terms, although radically different.

In doubtful cases this Court is accustomed to pay no little deference to the meaning placed on a statute by the department of the Government whose duty it is to apply it to its subject-matter, and it is respectfully submitted that it would seem that under this rule of decision the meaning placed on the act of 1883 by the Navy Department, ever since its passage, and supported by the judgment of the Court of Claims, should be allowed controlling effect in the face of any doubt that may becloud the meaning of Congress.

In view, then, of these considerations, now seemingly brought to the Court's attention for the first time, it is respectfully submitted, as an additional argument entitled to weight, that it would be severe if officers who have been transferred in the naval service and received longevity pay on the faith of this long-prevailing interpretation of the act of 1883 should now be compelled, upon a mere mistake of law, to refund what they have honestly and innocently received as their due.

As the chief of the Bureau of Construction and Repair says in his letter of February 14, 1894, hereto annexed, "the above payments having been made by the accounting officers of the Treasury in conformity with previous decisions of the Court of Claims and the established rulings of the Navy Department as to re-entry into the service, *it would seem a very great hardship* to compel these officers to make restitution of the money paid by the Government's authorized agents in conformity with legal decisions, said payments having been received by the officers themselves in good faith as their right, in virtue of their previous experience in the service."

But, aside from the inexpediency of unsettling what has been once settled, the interpretation here contended for should be adhered to, because, as we hope to show, it is closely interwoven with the good of the service, while, on the other hand, that insisted upon by the Government would, if carried into effect, produce inequalities in pay which would be derogatory to the rank of the officers who have been transferred from one branch of the service to another under the old view of the act of 1883, and subject them to a demoralizing influence, springing from a sense of disappointment and of disparaging discrimination in favor of their juniors in the service, and would, furthermore, tend to cripple the service by placing a serious obstruction in the way of appointments in the future from one branch of it to another.

To show, in the striking way of concrete examples, how unjustly the view of the statute contended for by the Government would operate, let us take for illustration the cases of Assistant Naval Constructors Lloyd Bankson and Richmond P. Hobson.

Bankson, who was appointed from the rank of assistant engineer on July 1, 1889, and who has been in the service sixteen years and four months, all told, would draw pay under the ruling of the Court at the rate of $2,200 per

annum, whereas Hobson, who was appointed from the rank of naval cadet on July 1, 1891, and who has been in the service eight years and eight months only, is by the operation of the act of 1883 entitled to pay at the rate of $2,600 per annum. Thus Bankson, who, by virtue of seniority, ranks Hobson in the construction corps, receives $400 less pay, which must ever be a solecism and a contradiction to the military apprehension.

By applying the interpretation contended for by the counsel for the Government to the following examples taken from the corps of professors of mathematics it will be more manifest still that the act so construed will defeat the underlying principle of longevity pay by placing a premium *on leaving the service and then returning to it after some considerable interval with impaired efficiency.*

In 1873 W. W. Hendrickson, a lieutenant commander in the navy, resigned for the purpose of accepting an appointment as professor of mathematics, was so appointed, and was allowed by the Treasury Department the benefits of his previous thirteen years' service. In 1877 H. D. Todd, who had also resigned when a lieutenant commander, in 1866, but who had spent the intervening eleven years in civil life, was appointed a professor of mathematics, and he also was allowed by the Treasury Department the benefit of his previous naval service; but, under the view contended for by the Government, the former officer would be deprived of the benefits of his service in the line of the navy, while the latter, his junior in rank, would continue to receive credit for all his service and would thus have the higher rate of pay *for the very reason which should give him the lower.*

It would also seem proper to bring to the attention of the Court the fact that there are only fifteen officers who could in any way be affected by the recent decision of the Court, and they are officers who were appointed to their present positions by reason of special qualifications, their previous service in other branches of the navy being considered of

great benefit to the Government in the performance of their new duties. In view of this fact it would seem a special hardship to deprive them of the benefits of such previous service in computing their pay, while other transferred officers whose service was interrupted by a period of civil employment of greater or less length and whose professional knowledge must have deteriorated somewhat in the interval receive all the benefits of their previous service.

There would seem to be little room for doubt, therefore, that the enforcement of this new reading of the statute would necessarily have a disparaging effect on the rank of all officers in Bankson's situation and would prove a source of more or less demoralization, besides tending, as we have already said, to hamper the service by discouraging transfers in cases where, under the ruling of the Court, the officer transferred would not be entitled to a time credit on his new commission, because an officer could hardly be expected to be willing to accept a transfer which would entail such sacrifices. And this, it is proper to remark, is *a very important consideration* in favor of adhering to the old interpretation, for *all appointments to the construction corps are made from the line and engineer corps* and not from the civil walk.

The good of the service is for that reason deeply implicated in the old practice.

In his letter to the Secretary of the Navy of February 14, 1894, hereto annexed, the chief of the Bureau of Construction says:

"If the present decision of the Court holds, its immediate effect upon the construction corps will be to place certain officers *in a most anomalous condition as regards pay*, since it will reduce their compensation below that received by those several years their juniors, and in October, 1895, *the seven senior assistant constructors will be receiving less pay than the assistant constructor now at the bottom of the list, although the latter entered the naval service from four to ten years after the above-mentioned seniors.*" [Italics our own.]

Again, he says:

"I do not consider it proper for me to deal in the least with the question of law involved, but in equity it seems that an unwitting injustice has been done to officers whose *high class-standing, special qualifications, and previous service caused their selection for appointment to other corps of the service in the interests of the Government* and yet who find themselves, after a lapse of several years, *deprived of all the benefits of their previous service and placed in a worse position as regards pay* than *those many years their juniors.*" [Italics our own.]

It will be seen that the Secretary of the Navy, in his letter hereto annexed, is in entire agreement with the chief of the Bureau of Construction.

This Court being powerless to reach the firmly rooted practice of the Navy Department that treats a transfer as a re-entry into the service, that being a matter which falls within the inviolable domain of executive discretion, it is respectfully submitted that the only way to preserve consistency and avoid the anomalies and evils above pointed out seems to be by adhering to the interpretation placed on the act by the department having full authority over the whole subject and a more intimate acquaintance with the bearings of the act than any other expositor or department of the Government could expect to have.

As there is no intimation in the law that the right to longevity pay is dependent on any particular time during which the officer has been out of the service when he last entered it, and as the officer transferred is during the interval between resignation and reappointment, however short the interval may be, as much out of the service, according to the settled practice of the Navy Department, as though he had laid down his first commission without any expectation of reappointment, it would seem that the Court may restore harmony by giving the old interpretation its sanction *without doing violence to a single word of the statute.*

But, aside from the act of 1883, it is respectfully submitted that the appellee ought to have an opportunity to argue the question whether the United States is entitled to recover back money paid him under a mistake of law and with full knowledge of all the facts.

This precise question was not raised by the counsel for the Government, and, it would seem, could not have been properly raised in the state of the pleadings, the Government not having pleaded the alleged excessive payments by way of set-off, and the claimant, being therefore completely without notice by the pleadings that any such question as his liability to refund money paid to him as compensation, under a mistake of law, would be raised, should be allowed to discuss the question, especially as it is *res integra* in this Court.

The Court of Claims has held that the Government cannot, any more than an individual, recover back money upon the ground that it was paid under a mistake of law. (Hedrick *vs.* U. S., 16 Ct. Cl., 88; see also Miller's case, 19 *ib.*, 354; Palen's case, *ib.*, 394; Hartson's case, 21 *ib.*, 451.)

But this Court has never decided the point, though it has several times referred to it. (U. S. *vs.* Philbrick, 120 U. S., 59; McElrath *vs.* U. S., 102 U. S., 441; U. S. *vs.* Burchard, 125 U. S., 177.)

It is respectfully submitted that the reasons above given appear to be sufficient to entitle the appellee to a rehearing, or, at the very least, entitle him to request the Court to strike from its opinion, in the case of United States *vs.* Philip R. Alger, the reasoning and observations in which are understood to apply to the case of the appellee as well, the intimation that it is a possible hypothesis in the case that the appellee might have sent in a formal resignation "for the purpose of eluding the statute and claiming longevity pay on the higher scale."

The appellee and the other officers who are in his situation feel the sting of the Court's intimation all the more be-

cause they believe it to be undeserved, and that the Court will so consider it in the light of what is above stated.

And the undersigned doth certify that he has carefully considered the questions involved in this case and the opinion of the Court, and is of the opinion that the case should be reheard.

WILLIAM A. MAURY,
Of Counsel, &c.

WASHINGTON, D. C.,
1505 *Penn. Ave.*

APPENDIX.

LETTER OF ASSISTANT NAVAL CONSTRUCTOR W. L. CAPPS.

(Copy.)

NAVY DEPARTMENT,
BUREAU OF CONSTRUCTION AND REPAIR,
WASHINGTON, D. C., *February* 14, 1894.

SIR: 1. A recent decision of the Supreme Court seriously affects the status of commissioned officers who have resigned from one branch of the service and have been appointed to another, inasmuch as it deprives such officers of the benefits of their previous service in computing longevity in the lowest grade having graduated pay.

2. The immediate effect of this decision is to reduce the pay of officers at the head of the list of assistant naval constructors to an amount less than that allowed their juniors in the same grade who entered the naval service and the construction corps several years after those at the head of the list.

3. Moreover, in the case of Naval Constructors Armistead, Baxter, and Stahl, and Assistant Naval Constructor Capps, it checks against their pay the amount claimed to have been overpaid them by reason of crediting these officers with their previous service in the line and engineer corps of the navy.

4. The invariable practice of the Navy Department has been to regard transfer from one branch of the service to another as a re-entry into the service, as is clearly shown by the department's requirement that officers should resign their commissions before being appointed to another corps, and placing them at the bottom of the list of officers of the corps to which they are transferred, even though juniors in the line and engineer corps may become seniors in the construction corps, as has already happened in several instances.

5. A similar method is in force in the army, where trans-

fer from the line to a staff corps involves resignation of the former commission and necessitates an officer's going to the bottom of the list to which transferred. As in the navy, this sometimes results in a change of relative position, seniors in the line becoming juniors in the corps to which last appointed.

6. The above methods of resignation and transfer have been unquestioningly accepted by the officers transferred as just and fair, and the accounting officers of the Treasury and Court of Claims have, in the cases of certain officers of the construction corps, allowed them the benefits of their previous service and paid them accordingly, such pay having been received for the past six years.

7. Should the present construction of the Supreme Court as regards the status of these officers be considered final, it will work very great injustice to certain professors of mathematics and naval constructors who resigned their commissions in other branches of the service and were then appointed to their present corps, believing that established rulings of the Treasury and Navy Departments would not be disturbed, and that they would continue to receive in their new grades the benefits of their previous service, and not be placed at a disadvantage as compared with their juniors in rank in the new corps, who are also their juniors in length of service in the navy.

8. In view of the above facts I beg to request permission from the department to seek relief from Congress, and also request that in its endorsement the department may call attention to its practice in making such appointments, considering them as re-entries into the service, and may make such other remarks as it may deem proper concerning the justice of affording relief to the officers so injuriously affected by the decision of the Supreme Court.

Very respectfully,

(Signed) W. L. Capps,
Assistant Naval Constructor, U. S. N.

The Secretary of the Navy.

LETTER OF THE CHIEF OF THE BUREAU OF CONSTRUCTION.

NAVY DEPARTMENT,
BUREAU OF CONSTRUCTION AND REPAIR,
WASHINGTON, D. C., *February* 14, 1894.

SIR: 1. In forwarding the enclosed communication from Assistant Naval Constructor Capps, I desire to express my hearty approval of any measure which may afford relief to those officers who have been so unfortunately affected by a recent decision of the Supreme Court.

2. If the present decision of the Court holds, its immediate effect upon the construction corps will be to place certain officers in a most anomalous condition as regards pay, since it will reduce their compensation below that received by those several years their juniors, and in October, 1895, the seven senior assistant constructors will be receiving less pay than the assistant constructor now at the bottom of the list, although the latter entered the naval service from four to ten years after the above-mentioned seniors.

3. Naval Constructors Armistead, Baxter, and Stahl having been promoted, their present pay will not be affected, but their accounts will be charged with the amount claimed to have been overpaid them as assistants. Assistant Naval Constructor Capps, not yet having received his promotion to the grade of naval constructor, will have his pay immediately reduced to that received by the junior member of the corps, and in addition will have charged against him the total amount claimed to have been overpaid him by the accounting officers of the Treasury during the past six years by reason of his having been credited with his previous service in the line of the navy.

4. The above payments having been made by the accounting officers of the Treasury in conformity with previous decisions of the Court of Claims and the established rulings of the Navy Department as to re-entry into the service, it would seem a very great hardship to compel these officers to make restitution of the money paid by the Government's authorized agents, in conformity with legal decisions, said payments having been received by the officers themselves in good faith as their right in virtue of their previous experience in the service.

5. I do not consider it proper for me to deal in the least

with the question of law involved, but in equity it seems that an unwitting injustice has been done to officers whose high class-standing, special qualifications, and previous service caused their selection for appointment to other corps of the service in the interests of the Government, and yet who find themselves after a lapse of several years deprived of all the benefits of their previous service and placed in a worse position as regards pay than those many years their juniors.

6. Aside from the interests of individuals involved in this case, I beg to impress upon the department the urgent necessity of taking such measures as it may deem just and expedient to rectify a wrong which would tend to impair the efficiency of the construction corps by giving least compensation to those whose greater experience and responsibility certainly entitle them to most consideration.

Very respectfully,

(Signed) PHILIP HICHBORN,
Chief Constructor, U. S. N., Chief of Bureau.

The SECRETARY OF THE NAVY.

LETTER OF THE SECRETARY OF THE NAVY.

NAVY DEPARTMENT,
WASHINGTON, *February* 28, 1894.

SIR: Referring to your letter of the 14th instant, forwarded through the chief of the Bureau of Construction and Repair, in which you state that the recent decision of the Supreme Court in the case of The United States, appellant, *vs.* Albert W. Stahl seriously affects the status of commissioned officers who have resigned from one branch of the service and have been appointed to another, inasmuch as it deprives such officers of the benefits of their previous service in computing longevity in the lowest grade having graduated pay, and ask permission to seek relief from Congress, I have to state that, after a careful consideration of the facts set forth in your letter and in that of the chief of the bureau, the department deems it entirely proper that you should seek such relief, and your request is therefore granted.

In the decision in question and in that of The United States *vs.* Philip R. Alger, therein cited, the Court holds that where an officer resigns from one corps of the navy for the

purpose of accepting an appointment in another his service is to be regarded as continuous service.

The chief of the Bureau of Construction and Repair, in his communication above mentioned, states that the immediate effect of this decision upon the construction corps "will be to place certain officers in a most anomalous condition as regards pay, since it will reduce their compensation below that received by those several years their juniors, and in October, 1895, the seven senior assistant constructors will be receiving less pay than the assistant constructors now at the bottom of the list, although the latter entered the naval service from four to ten years after the above-mentioned seniors."

It has been the invariable practice of the Navy Department to require officers serving in one branch of the naval service to resign from the navy before accepting appointment to any other branch of the service, and it has further been the uniform practice to place the names of such officers, without regard to their previous rank, at the foot of the list of officers in the new corps.

In such cases it has been the practice to require a new oath of office to be taken, which is not required in case of an ordinary promotion.

It appears from the above statement that the department has always held that such transfer constitutes a re-entry into the navy, and accordingly officers so transferred have been placed at the foot of the list in the corps which they enter.

Under these circumstances, and inasmuch as a change in the practice of the department in respect to the rank and pay of officers who by reason of special qualifications and previous service have been selected for appointment to other corps would result in serious hardship to such officers, the department, concurring in the recommendation of the chief of the Bureau of Construction and Repair on the subject, gives its approval to your request for permission to seek relief from Congress.

Very respectfully,

(Signed) H. A. HERBERT,
Secretary of the Navy.
(S. C. L.)

Assistant Naval Constructor W. L. CAPPS, U. S. N.,
Navy Department.